STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Douglas B. Shapiro, P.J., and William C. Whitbeck, Cynthia Diane Stephens JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

MICHAEL RADANDT, **No. 150906**
Defendant-Appellant.

St. Joseph CC: 12-017690-FH
COA No. 314337

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Questions

I.

When knocking at a door commonly employed for making inquiry proves insufficient to initiate a conversation in spite of indications that someone is in or around the house, may an officer take reasonable steps to speak with an occupant even where such steps require an intrusion into the curtilage?

Amicus answers: YES

II.

To trigger the exclusionary rule, improper police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. Where evidence is discovered through execution of a warrant the affidavit to which contains material facts learned from an improper warrantless search that was close enough to the line of validity to render the belief of the officers in the validity of the search warrant objectively reasonable, does the good-faith exception preclude exclusion of evidence discovered in execution of the warrant?

Amicus answers: YES

Statement of Facts

Amicus adopt the Statement of Facts of the People.

Argument

I.

When knocking at a door commonly employed for making inquiry proves insufficient to initiate a conversation in spite of indications that someone is in or around the house, an officer may take reasonable steps to speak with an occupant even where such steps require an intrusion into the curtilage.

A. Introduction

1. The Court's questions and the answers of the amicus

In its grant of leave, this Court has directed these issues be briefed:

> (1) whether the police officers unlawfully expanded a "knock and talk" procedure by entering the defendant's back yard and walking onto a wooden deck, which was attached to the home, see *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013); and
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> (2) if a constitutional violation occurred, whether the good-faith exception to the exclusionary rule applies under the facts of this case. See *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

Amicus answers that the entry onto the property was not within the protection of the Fourth Amendment here because within an implied license or permission of limited entry within the curtilage. If the entry onto the property is deemed within the Fourth Amendment, then the evidence found is admissible nonetheless under the good-faith exception to the exclusionary rule, a search warrant having been obtained containing information gained during the entry onto the curtilage that a reasonable officer objectively could believe was lawfully acquired.

2. Terminology

When construing a constitutional provision, it is generally wise to return to its text as the starting point, rather than the gloss that has been laid upon it, for as Chief Justice Burger once noted, the "seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'"[1]

The Fourth Amendment, in its 54 words and two clauses, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment thus concerns two types of governmental conduct—searches, and seizures—and "indicates with some precision the places and things encompassed by its protections"[2]; that is, "persons, houses, papers, and effects." And the Amendment establishes that the protection provided is against *unreasonable* governmental searches and seizures with regard to these places and things, the current prevailing view being that "'searches conducted outside the judicial

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[1] *United States v. 12 200-ft. Reels of Film,* 413 U.S. 123, 127, 93 S.Ct. 2665, 2668.37 L.Ed.2d 500 (1973), are nowhere more applicable than in this context:

[2] *Oliver v. United States*, 466 U.S. 170, 176, 104 S.Ct. 1735, 1740, 80 L.Ed. 2d 214 (1984).

process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"[3]

Because neither seizures nor searches are all of one piece, certain terms, or short-hand expressions, are employed to distinguish the different sorts of seizures and searches in relation to the requirement of reasonableness. For example, a brief seizure—though forcible, as without consent—for investigative purposes is different in degree from a seizure to hold one to answer for a crime. Though neither "arrest" nor "stop" appear in the Fourth Amendment, then, those terms are employed as sobriquets for these types of seizures of the person, as it is unreasonable *seizures of the person* that the text of the Fourth Amendment protects against, and, being different in degree, a different level of cause is required depending on the nature of the seizure, the one requiring reasonable suspicion, the other probable cause. But for any level of cause to be required to justify a seizure of the person, there must indeed *be* a seizure of the person, and so it has come to be understood that a seizure of the person is accomplished when the police intentionally acquire physical control over an individual, which can be accomplished by the actual application of physical force, or a command or show of force, to which the individual yields.[4]

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[3] *Arizona v Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 1716, 173 L.Ed. 2d 485 (2009), quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It has been said by at least one commentator that the warrant "exceptions" are actually "neither few in number nor 'well-delineated.'" Whitebread and Slobogin, *Criminal Procedure (4th Ed.)*, § 4.05(a), p. 139.

[4] See e.g. *Browyer v. Inyro County*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.2d. 2d 628 (1989); *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L.2d 23d 690 (1991).

Similarly so with searches, which also are not all the same in degree. For example, a search of a person detained on reasonable suspicion for investigation is limited in scope to a pat of the outer clothing for weapons or items that might be used as weapons against the officer, and, again, though the term is not employed in the Fourth Amendment, the sobriquet of "frisk" is employed to identify it. Searches of persons, houses, papers, or effects, of an individual must be justified by a particular level of cause, depending on the nature of the intrusion and its justification, just as with seizures of the person, but again, there must first *be* a search implicating one of these protected areas.[5] On the other hand, that which a person "knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[6]

While the use of expressions such as "stop," "arrest," and "frisk" are analytically useful in distinguishing degrees of seizures and searches, not all such sobriquets are helpful, and amicus believes that the terms "knock and talk," and its cousin "walk and talk,"[7] bring nothing to the table. The short-hand "knock and talk" can in fact cause confusion[8]; indeed, it has come often to be referred to as an "exception to the Fourth Amendment's warrant requirement."[9] But cases such as the present one do not concern any "exception" to the warrant requirement; rather, the

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[5] *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). Note open fields.

[6] *Illinois v. Rodriguez*, 497 U.S. 177, 190, 110 S. Ct. 2793, 2802, 111 L.Ed. 2d 148 (1990.)

[7] See *United States v. Ayon-Meza*, 177 F.3d 1130, 1133 (CA 9, 1999).

[8] See Federalist "Mark Antony" in reply to the antifederalist "Brutus," Boston Independent Chronicle, January 10, 1788: "It frequently happens that precision is lost in conciseness."

[9] See e.g. *United States v. Walker*, 799 F.3d 1361, 1362 (CA 11, 2015).

question is whether an entry by law enforcement officers onto what might be deemed the curtilage is, under the circumstances, within the Fourth Amendment at all, or is instead *without* the Fourth Amendment because the entry was permitted by an implied license or permission, the issue turning on the facts of the particular situation.[10] It is this question in these terms that amicus will address here.

B. *Jones* and *Jardines* and the "trespass" doctrine

1. The pre-*Jones* and *Jardines* understanding

Professor LaFave has observed that cases are legion for the proposition that it is *not* the case that

> any viewing or hearing of what is occurring in premises *is* a search if the police were within the curtilage at the time. 'A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there.' . . . Thus, courts have held 'that police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public,' and that in so doing they 'are free to keep their eyes open and use their other senses.' This means, therefore, that if police utilize 'normal means of access to and egress from the house' for some legitimate purpose, such as to make inquiries of the occupant . . . it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling.[11]

And "legitimate police business may occasionally take officers to parts of the premises not ordinarily used by visitors, as '*where knocking at the front door is unsuccessful in spite of*

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[10] See 1 LaFave, *Search and Seizure (5th Ed.)*, § 2.3(c), p. 751-752.

[11] 1 LaFave, *Search and Seizure (5th Ed.)*, § 2.3(c), p. 753-755 (footnotes omitted).

indications that someone is in or around the house.'"[12] Amicus will return to the sort of cases described by Professor LaFave subsequently, including the lead Michigan case, *People v. Houze*,[13] not cited by appellant. But such an exploration is not fruitful if *United States v. Jones*,[14] and *Florida v. Jardines*[15] have worked a sea change in Fourth Amendment doctrine. And so close attention to these cases at the outset is required.

2. *Jones* and the notion of trespass to chattels

FBI agents obtained a warrant to install a GPS tracking device on the undercarriage of Jones's Jeep vehicle. The warrant authorized installation of the device in the District of Columbia within 10 days; the warrant was not installed within 10 days, but on the 11th day, and was installed in Maryland, rather than the District of Columbia. The attachment of the device, then, was treated by the Court as warrantless. The government argued that there was nonetheless no constitutional issue, as no search had occurred at all under the Fourth Amendment. The Court disagreed, saying that "installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'"[16] The Court so found because, it said, the government had "physically occupied private property [attaching the device]

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[12] 1 LaFave, § 2.3(f), p. 788-789 (emphasis supplied), a point to which amicus will, of course, return.

[13] *People v. Houze*, 425 Mich. 82 (1986) (finding no Fourth Amendment intrusion by police entry into curtilage from alley through back gate to talk to those in the garage on the premises, having reason to believe persons were in the garage).

[14] *United States v. Jones*, __U.S.__, 132 S. Ct. 945, 181 L.Ed.2d 911 (2012).

[15] *Florida v. Jardines*, __U.S.__, 133 S.Ct. 1409, 185 L.Ed.2d 945 (2013).

[16] *Jones*, 132 S.Ct. At 949.

on the vehicle], *for the purpose of obtaining information*."[17] The "text of the Fourth Amendment reflects its close connection to property," and so Jones's Fourth Amendment rights did not "rise or fall with the *Katz* formulation"[18] of a reasonable expectation of privacy in the undercarriage of his vehicle, the *Katz* test being an addition to, not a substitute for, "the common-law trespassory test."[19] Because the government had committed a trespass to chattels[20]—"physically occupied private property—*for the purpose of gaining information* by attaching the GPS device, a search had occurred. But "[t]respass alone does not qualify" as a Fourth Amendment search; rather, there must be "conjoined" with trespass "an attempt to find something or to obtain information."[21] Whether the search in *Jones* was reasonable without warrant, and whether a

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[17] *Jones*, 132 S.Ct. At 949 (emphasis supplied).

[18] *Jones*, 132 S.Ct. At 950.

[19] *Jones*, 132 S.Ct. At 951. That there ever *was* a "common-law trespassory" test is subject to great doubt. One commentator has written that "The apparent restoration of a pre-*Katz* trespass test in *Jones* reflects the widely shared assumption that pre-*Katz* search doctrine was in fact based on trespass law. . . . [but] no trespass test was used in the pre-*Katz* era. Neither the original understanding nor Supreme Court doctrine equated searches with trespass. . . . The Court began to focus on physical intrusion as a guide starting in the 1920s. But even decisions focused on physical intrusion eschewed reliance on the technicalities of trespass law. No historical trespass era existed. Surprisingly, the first Supreme Court case applying a trespass test to identify Fourth Amendment searches appears to be *United States v Jones*." Orin S. Kerr, "The Curious History of Fourth Amendment Searches," 2012 Sup. Ct. Rev. 67, 68-69 (2012).

[20] But note that Blackstone says that trespass to chattels required that the chattel "had been misappropriated or destroyed," which did not occur in *Jones*. See Christopher Slobogin, "Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory," 8 Duke J. L. & Pub. Pol'y (Special Issue) 2, 12 (fn 62) (2012).

[21] *Jones*, 132 S. Ct. at 951.

lesser standard than probable cause for installation is required, were questions the Court did not reach, the Government not having raised them below.

3. *Jardines* and the notion of trespass to the curtilage

Surprisingly, though the Court in *Jones* used the term "trespass" when considering the attachment of the GPS device to the undercarriage of Jones's vehicle, it did *not* use that term *at all* when discussing the entry onto the curtilage of the dwelling that occurred in *Jardines*. Based on a tip, detectives went to the residence of Jardines, and a detective approached the home with a trained drug-sniffing dog. As the approach was made, the dog sensed an odor he had been trained to seek out. The detective gave the dog the play of his leash, and the dog ultimately sat after sniffing the base of the front door, which was that which the dog was trained to do after discovering the strongest point of origin of the odor. The dog was pulled away, and a search warrant obtained, the execution of which revealed marijuana plants.[22]

It was uncontested that there had been an entry onto the curtilage—the area "'immediately surrounding and associated with the home'—what our cases call the curtilage"—a part of the "house" protected by the Fourth Amendment, for "[t]he front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'"[23] Because, then, there had been an entry onto "a constitutionally protected area," the question was, said the Court, "whether it was accomplished through an unlicensed physical intrusion."[24]

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[22] *Jardines*, 133 S. Ct. at 1413.

[23] *Jardines*, 133 S. Ct. at 1415.

[24] *Jardines*, 133 S. Ct. at 1415.

What determines license (again, the Court, oddly, never mentioning trespass)? License may be implied, the Court continued, "'from the habits of the country,' notwithstanding the 'strict rule of the English common law as to entry upon a close.'" And so even unwelcome entries may be licensed by the habits of the country, "'justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.'"[25] This license is implicit, and "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. . . . Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'"[26]

But, said the Court, there is no customary invitation to bring a trained police dog to explore the area around the home in the hope of discovering evidence "or something else." Though again recognizing that the implicit license may extend to the unwelcome—to "find a visitor knocking on the door is routine (even if sometimes unwelcome)"—the Court said that the scope of the license is "limited not only to a particular area but also to a specific purpose,"[27] the Court apparently of the view that some unwelcome entries, even if not extending beyond the area of other unwelcome entries, are less equal. With a flourish that one highly-regarded commentator, Professor LaFave, has referred to in his treatise as "dizzying in its circularity," and

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[25] *Jardines*, 133 S. Ct. at 1415.

[26] *Jardines*, 133 S. Ct. at 1415-16.

[27] *Jardines*, 133 S. Ct. at 1416.

"extremely bizarre reasoning,"[28] the Court said that "the background social norms that invite a visitor to the front door do not invite him there *to conduct a search*. . . . the question before the Court is precisely *whether* the officer's conduct was an objectively reasonable search. . . . that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had a license to do. . . . the background social norms that invite a visitor to the front door do not invite him there to conduct a search"[29]

4. *Jones* and *Jardines* do not undermine existing law on police entry onto the curtilage to make inquiry

As the *Jardines* dissenters observed, even the majority recognized that the implied license to approach the front door of a house[30] is not "restricted to categories of visitors whom an occupant of the dwelling is likely to welcome," and "extends to police officers who wish to

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[28] 1 LaFave, *Search and Seizure (5th Ed.)* (2014-2015 pocket part), § 2.2(g), p. 32-33; § 2.3(c), p. 40-41.

[29] *Jardines*, 133 S. Ct. at 1416-17. But of course the police were only on the porch with a "*purpose to conduct a search*" if a sniff of a trained dog at the front door *constitutes* a search. It does not. *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). As Professor LaFave puts it regarding the reasoning of the Court here: "The issue in the case is whether the dog's front-door sniff was a search, which must be answered in the affirmative if the officer's purpose was (again, to have the dog sniff the front door) was to 'conduct a search,' answerable only by taking the ultimate *result* in *Jardines* and backing it up to this point in order to provide the justification for the ultimate result. Remarkable! . . . . the 'conduct a search' tautology is . . . useless." 1 LaFave, § 2.3(c), p. 40-41 (2014-2015 pocket part).

[30] The present case does not involve the front door; as amicus has noted, there are many, many cases involving ingress of the curtilage at other than the route to the front door, including *People v Houze*, supra, from this Court, to which amicus will return, and which, amicus argues, are undisturbed by *Jones* and *Jardines*.

gather evidence against an occupant (by asking potentially incriminating questions)."[31] Surely no one would take the view that police officers in the performance of their duties may not, in investigating an established or suspected crime, knock on the doors of possible witnesses or even suspects to ask questions, even questions the answers to which might prove incriminating.[32] While, said the dissenters, the "law might attempt to draw fine lines between categories of welcome and unwelcome visitors, distinguishing, for example, between tolerable and intolerable door-to-door peddlers (Girl Scouts selling cookies versus adults selling aluminum siding) or between police officers on agreeable and disagreeable missions (gathering information about a bothersome neighbor versus asking potentially incriminating questions)," the "law of trespass has not attempted such a difficult taxonomy."[33]

Professor LaFave has said that:

> It is not objectionable for an officer to come upon that part of the property which "has been opened to public common use." The route which any visitor to a residence would use is not private in

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[31] *Jardines*, 133 S. Ct. at 1420 (Alito, J., dissenting).

[32] "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 1862, 179 L.Ed. 2d 865 (2011).

[33] *Jardines*, 133 S. Ct. at 14220 (Alito, J., dissenting). Justice Alito cited: "*Desnick v. American Broadcasting Cos.,* 44 F.3d 1345, 1351 (CA7, 1995) ('[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent'); cf. *Skinner v. Ogallala Public School Dist.,* 262 Neb. 387, 402, 631 N.W.2d 510, 525 (2001) ('[I]n order to determine if a business invitation is implied, the inquiry is not a subjective assessment of why the visitor chose to visit the premises in a particular instance'); *Crown Cork & Seal Co. v. Kane,* 213 Md. 152, 159, 131 A.2d 470, 473–474 (1957) (noting that 'there are many cases in which an invitation has been implied from circumstances, such as custom, and that this test is "objective in that it stresses custom and the appearance of things' as opposed to 'the undisclosed intention of the visitor').

> the Fourth Amendment sense, and thus if police take that route "for the purpose of making a general inquiry" or for some other legitimate reason, they are "free to keep their eyes open," and thus it is permissible for them to look into a garage or similar structure from that location. On the other hand, if the police depart from that route and go to other, more private parts of the curtilage in order to look into a structure there, this constitutes a search, even if the police might have been able to (but didn't) make the same observation from outside the curtilage.[34]

Further, "[W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment."[35] And so entries onto property of residences such as walkways, driveways, carports, and the like—even going to the backdoor, as will be discussed—have been held not to constitute intrusions under the Fourth Amendment.[36] Do *Jones* and *Jardines* call this established doctrine into question? They do not.

The *Jardines* test that an entry into the curtilage is unlicensed and therefore a "search" within the meaning of the Fourth Amendment when the purpose of the entry is to "conduct a search," even when the activity engaged in—use of a drug-sniffing dog—is *not* a search, is, given its circularity, difficult to parse and apply. But it is plain that both *Jones* and *Jardines* look to the *purpose* of the "interference" with personal property or entry onto the curtilage. In *Jones*, the Court said that a trespass to the chattel was not alone enough to constitute a violation of the Fourth Amendment; there must be "conjoined" with the trespass "an attempt to find something or

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[34] 1 LaFave,§ 2.3(e) (footnotes omitted), p. 774.

[35] 1 LaFave,§ 2.3(f), p. 782-786.

[36] LaFave, supra, see cases at fn 225 through 235. And see *People v Houze*, supra.

to obtain information." And in *Jardines* the Court said that an otherwise licensed entry into the curtilage—a police officer may go up to the door in as may any private citizen to make inquiry on any subject, welcome or not—is unlicensed, and therefore within the Fourth Amendment, if the police behavior "objectively reveals a purpose to conduct a search." The Court in *Jardines* also referred to this "unlicensed" conduct as "gathering information in an area belonging to Jardines and immediately surrounding his house."[37]

An activity is a search if the purpose is to search is a tautology, as Professor LaFave has pointed out, and a test that says that otherwise licensed police entries onto the curtilage are unlicensed if their purpose is to "gather information" cannot, if taken literally and out of context, be taken seriously, as simply knocking on the door and making verbal inquiry—something the Court in *Jardines* recognizes is licensed, as does *Kentucky v King*—is the "gathering of information." "Because the 'conduct a search' tautology is so useless, it is necessary to search" for some other explication of *Jardines* as to that which constitutes a forbidden purpose,[38] "de-licensing" what would otherwise be a licensed entry. The sort of information sought must, then, be looked to in order to discern when an otherwise licensed entry onto the curtilage is unlicensed and thus within the Fourth Amendment because its purpose was "to search" or to "gather information" in an area belonging to an individual and immediately surrounding the house (the curtilage). And the Court put it another way as well; "[t]hat the officers learned what they

[37] *Jardines*, 133 S. Ct. at 1414.

[38] 1 LaFave,§ 2.3(c) (2014-2015 pocket part), p. 57.

learned only by physically intruding on Jardines' property *to gather evidence* is enough to establish that a search occurred."[39]

Again, the "dizzyingly circular" reasoning of *Jardines* makes the matter difficult, as does the fact that the Court refers to an entry onto the curtilage as unlicensed if its purpose was to "conduct a search"—or perhaps, to "gather evidence"—when, under settled precedent, the use of the dog was *not* a search. And in *Jones* the trespass to chattels was not itself within the Fourth Amendment, but only when conjoined with the "gathering of information," though that gathering, where done without the trespass, is not itself a search.[40] A look at the sort of entries onto the curtilage that are impliedly licensed through "the habits of the country" might provide guidance. *Jardines* makes clear that it is not only welcome entrances, but, at least in the absence of signs prohibiting soliciting, such entries to approach the door and contact an occupant as those by solicitors, from those selling Girl Scout cookies to those selling encyclopedia, are licensed. And approaches that are attempts to proselytize, be they religious or political, as when the individual attempting to contact an occupant of the premises wishes to leave literature, or persuade the occupant to a political or religious point of view, are within the custom of the country. But approaches to harass, as by ringing the doorbell and running off, or by ringing the bell and leaving the classic flaming bag of excrement, are certainly not only unwelcome, but unlicensed, not being attempts to contact the occupants of the premises for any legitimate purpose. The majority and dissent in *Jardines* agreed that the inquiry should be "'into the

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[39] *Jardines*, 133 S. Ct. at 1417 (emphasis supplied).

[40] "A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281, 103 S. Ct. 1081, 1085, 75 L.Ed. 2d 55 (1983).

appearance of things,' . . . what is 'typica[l]' for a visitor, . . . what might cause 'alarm' to a 'resident of the premises,' . . . what is 'expected' of 'ordinary visitors,' . . . and what would be expected from a 'reasonably respectful citizen."[41] Though a "reasonably respectful citizen" might bring his dog onto the porch and up to the door when making inquiry at a residence, that individual would not, as a matter of custom, be expected to introduce a trained dog "to explore the area around the home in hopes of discovering incriminating evidence," as "[t]here is no customary invitation to do *that*."[42]

At this time, perhaps no exegesis of *Jardines* can produce a meaningful "test." But it can be said that an otherwise licensed police entry onto the curtilage becomes unlicensed only when the purpose of the entry is to make some attempt to acquire information from the *residence*, including its curtilage, rather than from the occupant or resident—again, the Court referred to the unlicensed conduct as "gathering information *in an area* belonging to Jardines and *immediately surrounding his house*"—or when in an attempt to acquire information from an occupant or resident the officer does not employ the route which any visitor to the residence "would use for the purpose of making a general inquiry or for some other legitimate reason." Those myriad cases discussed by Professor LaFave, then, concerning entries onto the curtilage to make *inquiry* of a resident or occupant remain good law, and Professor LaFave's conclusions that "if police utilize normal means of access to and egress from the house for some legitimate purpose, such as to make inquires of the occupant . . . it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling," and that "legitimate

[41] *Jardines*, 133 S. Ct. at 1416 (footnote 2).

[42] *Jardines*, 133 S. Ct. at 1416.

police business may occasionally take officers to parts of the premises not ordinarily used by visitors, as '*where knocking at the front door is unsuccessful in spite of indications that someone is in or around the house*,'" also remain viable. The question here, then, is did the police conduct here fall within these cases? It did.

C. Police wishing to make an inquiry of a resident or occupant may enter the curtilage and take reasonable steps to speak with an occupant even where such steps require an intrusion into the curtilage

That *Jardines* does not undermine those cases establishing that "where knocking at the front door is unsuccessful in spite of indications that someone is in or around the house, an officer may take reasonable steps to speak with the person being sought out even where such steps require an intrusion into the curtilage"[43] is clear from *Carroll v. Carman,*[44] which post-dates *Jardines*, yet does not even cite it as relevant to the inquiry there. Officers received a report that a man named Zito, who had stolen a car and two loaded handguns, might have fled to the home of Andrew and Karen Carman. Two officers arrived, each in a separate patrol car, and while the front of the house faced a main street, the left side faced a side street, the house being on a corner lot. There being no parking available on the front of the house, the officers pulled to the side and parked. As they walked to the house, they saw either a carport or a shed and made inquiry there and received no reply, so continued walking toward the house. They saw a sliding glass door that opening onto a ground-level deck, and believed the sliding glass door "looked "looked like a customary entryway," and so decided to knock on it to make inquiry regarding the whereabouts of Zito. Andrew Carman came out and an altercation occurred with officer Carroll. Eventually,

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[43] *Hardesty v. Hamburg Twp.*, 461 F.3d 646, 654 (CA 6, 2006).

[44] *Carroll v. Carman*, __U.S.__, 135 S.Ct. 348, 190 L.Ed. 2d 311 (2014).

the Carmans consented to a search of the house for Zito, who was not there. The Carmans then sued, claiming that police had unlawfully entered their property when they went into their backyard and onto their deck without a warrant.

Officer Carroll defended at trial by arguing that the entry was lawful, as he had stayed "on those portions of the property that the general public is allowed to go on," while the Carmans argued that a visitor would have been expected to go to their front door. The trial court instructed the jury that "officers should restrict their movements to walkways, driveways, porches and places where visitors could be expected to go," and the jury returned a verdict for Officer Carroll. The Third Circuit, however, reversed, finding that a police inquiry at a residence must *begin* at the front door. The case being one of qualified immunity, the question was whether the law is settled that this is so, and the United States Supreme Court held otherwise. The Third Circuit had cited a case, *Estate of Smith v. Marasco,*[45] where when officers knocked on the door of a house and received no response they went into the backyard and entered the garage. The Third Circuit held that an "entry into the curtilage after not receiving an answer at the front door might be reasonable,"[46] but remanded because the trial court had not made sufficient factual findings to determine that question, there being, for example, no discussion of "the layout of the property or the position of the officers on that property, . . . [and] whether the officers followed a path or other apparently open route that would be suggestive of reasonableness."[47] The circuit

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[45] *Estate of Smith v. Marasco,* 318 F.3d 497 (CA 3, 2003) .

[46] *Marasco,* 318 F.3d at 520.

[47] *Marasco,* 318 F.3d at 521..

court in *Carroll* took this case as standing for the proposition that an inquiry at a house must *begin* at the front door.

The Supreme Court said, however, that "that conclusion does not follow . . . . *Marasco* . . . did not hold . . . that knocking on the front door is *required* before officers go onto other parts of the property that are open to visitors. . . . . Moreover, *Marasco* expressly stated that 'there [was] no indication of whether the officers followed a path or other apparently open route that would be suggestive of reasonableness.' . . . That makes *Marasco* wholly different from this case, where the jury necessarily decided that Carroll 'restrict[ed] [his] movements to walkways, driveways, porches and places where visitors could be expected to go.' . . . To the extent that *Marasco* says anything about this case, it arguably supports Carroll's view."[48] Surely, if the Court was of the view that it had decided in *Jardines* that when knocking at a door commonly employed for making inquiry proves insufficient to initiate a conversation, then in spite of indications that someone is in or around the house an officer may *not* take reasonable steps to speak with an occupant, but must leave, it would have said so.

The Supreme Court also found the decision of the circuit court "perplexing" given "the decisions of other federal and state courts, which have rejected the rule the Third Circuit adopted here."[49] Though the Court did not decide that these cases were necessarily correct, again, the

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[48] *Carroll,* 135 S. Ct. at 351.

[49] The Court cited *United States v. Titemore,* 437 F.3d 251 (CA 2, 2006) (officers bypassed a side door to go to a sliding door on a porch); *United States v. James,* 40 F.3d 850 (CA 7, 1994), vacated on other grounds, 516 U.S. 1022, 116 S.Ct. 664, 133 L.Ed.2d 515 (1995) (officers bypassed the front door of a duplex, and used a paved walkway along the side of the duplex leading to the rear side door); *United States v. Garcia,* 997 F.2d 1273, 1279–1280 (CA9, 1993) ("If the front and back of a residence are readily accessible from a public place, like the driveway and parking area here, the Fourth Amendment is not implicated

question being one of qualified immunity, it is again telling that the case makes no mention of *Jardines*, decided the previous year, undoubtedly because critical in *Jardines*—indeed, *necessary*—to the finding of lack of license was the purpose to "conduct a search," to "gather information in an area belonging to [the resident] and immediately surrounding his house." That purpose was absent in *Carroll* and is absent in the present case. After *Jardines* it is still the case that when knocking at a door commonly employed for making inquiry proves insufficient to initiate a conversation in spite of indications that someone is in or around the house, an officer may take reasonable steps to speak with an occupant even where such steps require an intrusion into the curtilage; that is to say, "legitimate police business may occasionally take officers to parts of the premises not ordinarily used by visitors, as '*where knocking at the front door is unsuccessful in spite of indications that someone is in or around the house.*'"

D. Under the circumstances here, it was objectively reasonable for the officers to believe they could take the path to the back porch or deck to inquire at the back door

The police, of course, have a duty to investigate possible criminality.[50] Members of the public do not. This matters. Defendant in his application gives an example of an entry into the

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when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling"); *State v. Domicz,* 907 A.2d 395, 405 (NJ, 2006) ("when a law enforcement officer walks to a front or back door for the purpose of making contact with a resident and reasonably believes that the door is used by visitors, he is not unconstitutionally trespassing on to the property").

[50] See e.g. *White v Beasley*, 453 Mich. 308, 331 (1996) (Cavanagh, concurring in part and dissenting in part): "The public-duty doctrine begins with the premise that police officers owe a duty to the public to investigate crime and to protect the citizenry *because* they are police officers."

backyard during a barbecue by someone electioneering; the People, on the other hand, posit facts substantially similar to the instant case, but with the entry to the back of the premises made by a UPS delivery person needing a signature for delivery. Defendant argues the entry he hypothesizes is unlicensed, and the People posit that the entry they hypothesize is licensed. Both are correct. There can be no "one size fits all" rule regarding implied license or permission arising from common custom, particularly when it is understood that some unwelcome entries are licensed—if, for example, defendant's campaigner had come to the front door, he might have been unwelcome, but his entry onto the premises would have been licensed by common custom under *Jardines*. Custom varies depending not only on the purpose of the entry but the person entertaining that purpose. So, just as in *Jardines* the purpose of the police entry—there, to conduct a search, as circular as the entry becoming a search because the purpose was to conduct a search (although it wasn't) may be—the purpose of the entry by *citizens* also matters. *And the "custom of the country" allows the police to enter the curtilage to do something that it does not allow to ordinary citizens—to investigate possible criminality.* It is expected that police officers will go to homes to make inquiry of possible witnesses and suspects of crimes; it is *not* expected that ordinary citizens will do so, and so the former are licensed for this purpose and the latter are not. And the police represent and are paid by the public. Thus, "legitimate police business may occasionally take officers to parts of the premises not ordinarily used by visitors, as '*where knocking at the front door is unsuccessful in spite of indications that someone is in or around the house.*'" An "ordinary visitor," such as a salesman, electioneer, or religious proselytizer is expected to "approach the home by the front path, knock promptly, wait briefly to be received,

and then (absent invitation to linger longer) leave."[51] And because an "ordinary visitor" may do this, so may a police officer; "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'"[52] But some ordinary citizens, in some circumstances—the UPS delivery person, the flower delivery person—may sometimes do *more* than approach the front door when there are *indications that someone is in or around the house*, and *so may the police* in investigating possible criminality by seeking to make inquiry, so long as a route that would be a normal means of access is employed, so it can be said that the police are not engaged in a general exploration, but truly attempting to engage a resident in a colloquy. Indeed, where it is apparent on approach that a person is in such an area within the curtilage as a carport or garage, *direct* inquiry at those locations is reasonable without inquiry at the front door.

This court's decision in *People v. Houze*, not cited by defendant, where the police entered the backyard from the back alley, is instructive. The police received a radio dispatch that the stripping of an automobile was in progress, and that those doing so were taking the parts to the garage at the year of a certain address. The officers went to the alley, where they found a stripped Cadillac. Approximately three-quarters down the alley was the garage at the rear of the described residence, and the officers approached the premises from the alley to make inquiry. The officers walked onto defendant's property from the alley to make inquiry at the walk-in door on the side of the garage, and could see through the window of the door that defendant and three others were dismantling an automobile.

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[51] *Jardines*, 133 S. Ct. at 1415-16.

[52] *Jardines*, 133 S. Ct. at 1415-16.

This court, in opinions for three justices by Justice Boyle, and for two justices by Justice Cavanagh, upheld the entry on the curtilage.

> The police did not enter defendant's home or peer into the windows of his home. Rather, they looked into an unattached garage which abutted a public alley from a common access route. This entry onto the curtilage and the observation by police into the garage was limited and reasonable under the circumstances.[FN 1]
>
> FN 1: "It is not objectionable for an officer to come upon that part of the property which 'has been opened to public common use.' The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and thus if police take the route 'for the purpose of making a general inquiry' or for some other legitimate reason, they are 'free to keep their eyes open,' and thus it is permissible for them to look into a garage or similar structure from that location." 1 LaFave, Search & Seizure, 2.3, p 318.
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> > Courts have upheld police entries onto driveways, carports, front walks, and porches as nonintrusive. See, e.g., *Pistro v. State,* 590 P.2d 884 (Alas.,1979)-an officer's observation of a stolen car from defendant's driveway; *State v Seagull,* 26 Wash.App. 58, 613 P.2d 528 (1980), aff'd 95 Wash.2d 898; 632 P.2d 44 (1981)-an officer's observation of marijuana plants in a greenhouse twenty feet from house from defendant's back door; *United States v. Ventling,* 678 F.2d 63 (CA 8, 1982)-an officer's observation of tire tracks from defendant's driveway and front door; *State v. Wilbourn,* 364 So.2d 995 (La., 1978)-officer's observation of suspect's car in carport from suspect's driveway. In each case, the courts found that the officers' observations were made from a normal means of ingress or egress.[53]

It was not necessary, then, for the police to first go to the front door of the house; entering the yard to go to the walk-in garage door from the alley in order to make inquiry at the garage was

[53] *People v. Houze*, 425 Mich. 82, 86, 92 (1986) (Justice Cavanagh, concurring).

reasonable, and made, this court said, "from a common access route," and thus, in the terminology of *Jardines*, within an implied license.

Hardesty v. Hamburg Twp.[54] also makes the point. After a minor was arrested for drunk driving and told the officer where she had been served alcohol—at the Hardestys' home—officers went to the home to investigate, and pounded on the front door, receiving no response. They had dispatch telephone the home, but nobody answered, and also called one resident's workplace, but received no answer. There was reason to believe someone was home, as the officers had seen lights in the house go off as they approached, and there were cars in the driveway. The officers went around the back of the house to try to contact someone in the house, and went up onto the deck to the sliding glass door, where they saw an individual lying on a couch, with blood on his hands and pants. Attempts to rouse him from outside were unsuccessful, and the officers, concerned for this person's well-being, entered the house. The Hardestys sued over the entry.[55]

The court followed the approach of several other circuits—the Third, Fourth, Eighth, and Ninth Circuits—which have all dealt with the situation "where police officers knocked on a front door and, upon not receiving an answer, proceeded to the back door." These circuits have held that "an officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence"; that "the Fourth Amendment does not prohibit police, attempting to speak with a homeowner, from entering the backyard when circumstances indicate they might find him there"; and that"[w]here officers are pursuing a lawful objective, unconnected to any search for the fruits and instrumentalities of criminal activity, their entry into the curtilage after

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[54] *Hardesty v. Hamburg Twp.*, 461 F.3d 646 (CA 6, 2006).

[55] *Hardesty,* 461 F.3d 649-650.

not receiving an answer at the front door might be reasonable as entry into the curtilage may provide the only practicable way of attempting to contact the resident."[56] The court concluded that

> Police officers are permitted to enter private property and approach the front door in order to ask questions or ask for consent to search the premises. But knocking at the front door will not always result in police officers being able to initiate the permitted conversation. . . . Even where someone is at home, knocking at the front door may go unheard. When the circumstances indicate that someone is home and knocking at the front door proves insufficient to initiate a conversation with the person sought, officers should not be categorically prevented from carrying out their investigative function. Therefore, we hold that where knocking at the front door is unsuccessful in spite of indications that someone is in or around the house, an officer may take reasonable steps to speak with the person being sought out even where such steps require an intrusion into the curtilage.[57]

Amicus will not belabor the point; there are other cases to the same point.[58]

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[56] The court cited *Estate of Smith v. Marasco,* 318 F.3d 497, 520–521 (CA 3, 2003); *United States v. Bradshaw,* 490 F.2d 1097, 1100 (CA 4, 1974); *United States v. Anderson,* 552 F.2d 1296, 1300 (CA 8, 1977); and *United States v. Hammett,* 236 F.3d 1054, 1060 (CA 9, 2001).

[57] *Hardesty*, 461 F.3d 653-654 (CA 6, 2006).

[58] See e.g. *Covey v. Assessor of Ohio Co*, 777 F.3d 186, 192-193 (CA 4, 2015)("An officer may also bypass the front door (or another entry point usually used by visitors) when circumstances reasonably indicate that the officer might find the homeowner elsewhere on the property"); *People v. Woodrome*, 996 N.E.2d 1143, 1149 (App. Ct., 2013) ("'[a]n officer may go beyond the front door to investigate by approaching the back door of a residence—either when no one answers a knock on the front door or where a legitimate reason is shown for approaching the back door.'"); *People v. Redman,* 900 N.E.2d at 1146 (Ill.App.3d, 2008). And see cases cited at 1 LaFave,§ 2.3(f), p. 782-786, fn 225-235.

Here, then, as explained by the People in their brief, the officers had ample reason to believe someone was home, and followed a worn path to the back of the home to further attempt inquiry.[59] Their conduct was within an implied license or permission under the circumstances, and no Fourth Amendment violation occurred, as the Court of Appeals properly held.[60]

E. Conclusion

The police, just as any ordinary citizen, may knock on the front door of a house to make inquiry. An entry of this sort onto the curtilage is within an implied license by the "custom of the country," which allows even unwelcome inquiries of this kind. But the same entry may be unlicensed depending on its *purpose*. A private citizen who enters to harass or bedevil has no license, nor would a private citizen have a license to enter to investigate possible criminality through inquiry at the premises, and a police officer would not have license to enter to "conduct a search." Some entries onto the curtilage beyond an approach to the front door by a private citizen would be licensed, as where a delivery is to be made requiring a signature, and no answer is received at the front door, but it is apparent there are persons in the backyard of the house. So long as a normal means of access is taken, the entry is licensed. And so with the police. The police may approach the door with an investigative purpose, a licensed entry an ordinary citizen would not have. And the police may proceed directly to other areas on the curtilage where it is apparent an individual is located, such as a driveway, carport, or garage. When knocking at a

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[59] See Appellee's Brief, pp. 16-19.

[60] The court's order refers to entry onto a "deck." Though in the end irrelevant to the inquiry, on the picture accompanying the defendant's brief amicus can make out no deck on the back of the house; at most, perhaps, there is some sort of small platform in front of the sliding glass door, which is not ground level.

door commonly employed for making inquiry proves insufficient to initiate a conversation in spite of indications that someone is in or around the house, the police are licensed by custom to take reasonable steps to speak with an occupant even where such steps require an intrusion into the curtilage, again, so long as a normal means of access is employed.[61]

[61] Amicus cannot help but note that it is somewhat remarkable that an attempt to make contact with residents of a home, when the police have reason to believe someone is home and there has been no answer at the front—or here, side—door, by proceeding down a path to the back door, might be thought to violate the Fourth Amendment, designed to protect against "the forcing open of persons' houses and the breaking open of their desks and cabinets in an effort to find the evidence inside. . . . During Virginia's convention to vote on the ratification of the Constitution,Patrick Henry spoke against ratification in part on the ground that the Constitution contained no protections against unreasonable searches and seizures. Henry gave examples of the scenarios that could arise without such protections: 'Suppose an exciseman will demand leave to enter your cellar or house, by virtue of his office; perhaps he may call on the militia to enable him to go. If Congress be informed of it, will they give you redress?" Without the protections of a bill of rights, Henry argued, federal officials seeking to enforce excise taxes could 'go into your cellars and rooms, and search, ransack and measure, everything you eat, drink and wear." Once again, the need for protections against search and seizure was articulated in the context of physical entry into the home." Kerr, supra.

II.

To trigger the exclusionary rule, improper police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. Where evidence is discovered through execution of a warrant the affidavit to which contains material facts learned from an improper warrantless search that was close enough to the line of validity to render the belief of the officers in the validity of the search warrant objectively reasonable, the good-faith exception precludes exclusion of evidence discovered in execution of the warrant.

The People in their brief have thoroughly and persuasively presented the principles concerning the purposes of the exclusion of probative evidence in a trial the goal of which is the ascertainment of truth, and when, then, that rule should not apply. Amicus will not long belabor the point. And, given the arguments in Issue I, amicus urges the court not to reach this question, the police not having violated the Fourth Amendment at all. But if the court finds otherwise, then it must also recognize that there was no law previous to this case—again, if the court so holds, which amicus strongly exhorts the court not to do—rendering the police walk from the side door along the drive to the sliding glass back door in order to make contact with someone in the house to engage them in a conversation, when there was ample reason to believe someone was home and no one had answered the knock on the side door, unconstitutional. The purpose of the exclusionary rule being to deter insolent police uses of authority, exclusion in a circumstance such as the present one inflicts gratuitous harm on the public interest.

The Supreme Court has said that the exclusionary rule is not designed for every circumstances where it might provide marginal deterrence; rather, "'an assessment of the

flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule'. . . . . 'evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'"[62] Indeed, "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional."[63] And so, then, to trigger its application, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[64] The conduct of the police in this case in no way approaches flagrant, deliberate, reckless, or grossly negligent conduct that the law should seek to deter.

The police here made no attempt to enter the house on the smell of marijuana giving rise to probable cause,[65] but obtained a search warrant. Assuming for the sake of argument only that their position in obtaining that information was a violation of the Fourth Amendment, the question becomes whether the good-faith exception to exclusion that ordinarily applies when the search is undertaken under warrant applies, or whether the inclusion of material information that

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[62] *Herring v. United States*, 555 U.S. 135, 143, 129 S. Ct. 695, 701-702, 172 L. Ed. 2d 496 (2009).

[63] *Herring*, 129 S. Ct. at 702.

[64] *Herring*, 129 S. Ct. at 702.

[65] The affidavit to the warrant here refers to the first entry onto the property by the police, but it is the second entry that resulted in information—the smell of marijuana in particular—that provides probable cause for the search warrant, standing alone.

was improperly obtained as a predicate for issuance of the warrant defeats the good-faith exception. Where, as here, the conduct revealing that predicate information is not of the sort subject to censure, the good-faith exception applies.

The point has been well made in *United States v. Massi*.[66] There the court held that where a search warrant affidavit includes material information from a predicate search that was improper, two requirements must be met for the good-faith exception to apply: "(1) the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant must be 'close enough to the line of validity' that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct, and (2) the resulting search warrant must have been sought and executed by a law enforcement officer in good faith as prescribed by *Leon*."[67] Both requirements are easily met here. The conduct of the officers was, in the view of amicus, *over* the "line of validity," but if not, it was surely right up to it, under current law. And the warrant was then obtained and executed in good faith.[68] While certainly "if the officer applying for the warrant knew or had reason to know that the information was tainted . . . then suppressing the evidence seized pursuant to the warrant 'pay [s] its way by deterring official lawlessness,'"[69] that is not remotely the case here, under the facts as found by the trial court.

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[66] *United States v. Massi*, 761 F.3d 512 (CA 5, 2014), cert. den. __US__, 135 S.Ct. 2377, 192 L.Ed.2d 164 (2015).

[67] *Massi*, 761 F.3d at 528.

[68] And see other cases, cited in the People's brief.

[69] *United States v. Woerner*, 709 F.3d 527, 533 (CA 5, 2013).

Because, then, the conduct of the officers here, even if viewed as improper, cannot be viewed as an insolent abuse of authority, or even reckless or grossly negligent, exclusion of the evidence obtained by the execution of the search warrant is inappropriate.

Relief

Wherefore, amicus respectfully request that this Court reverse the Court of Appeals.

Respectfully submitted,

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